Supreme Court, U.S.
FILED

(1)

93 2073 MAY 2 2 1994

No.

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANCIS J. DASHNAW,

Petitioner,

v.

U.S. Department of Transportation, an Executive Department of the Federal Government; FREDERICA PEÑA, Secretary of Transportation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Francis J. Dashnaw
P.O. Box 1018
S. Dennis, MA 02660
(508) 394-6954
Petitioner

200pp

QUESTIONS PRESENTED

1. Whether denial of a part of the requested make-whole relief as being "speculative" is consistent with the standards set by the Supreme Court.

2. Whether the Court of Appeals applied an appropriate and consistent standard and adhered to the guidance given by the Supreme Court in reversing the District Court's ruling on constructive discharge.

3. Whether it was error for Court of Appeals Panel to fail to consider the arguments on retaliatory conduct on constructive discharge claim.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	22
CONCLUSION	45
APPENDIX A	1a
APPENDIX B	9a
APPENDIX C	75a
APPENDIX D	88a
APPENDIX E	92a
APPENDIX F	106a
APPENDIX G	108a
APPENDIX H	132a

TABLE OF AUTHORITIES

Cases **Page**

Albermarle Paper Company v. Moody
422 U.S. 405, 418-19 (1975) . . . 24

Anderson v. Bessemer City
105 S.Ct. 1504 (1985) . . 31, 32, 40

Bishopp v. District of Columbia
788 F.2d 781 (D.C. Cir. 1986) 36, 41

Brown v. Marsh, 713 F.Supp. 20
(D.D.C. 1989) 24

Clark v. Marsh, 665 F.2d 1168
(D.C. Cir. 1981). 19,26,28,29,31,33,
35,36,40,41

Franks v. Bowman Transportation Co., Inc., 424 U.S. at 765 (1976). 24

Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104
(8th Cir. 1994) 26

Harris v. Forklift Systems, Inc.
114 S.Ct. 367 (1993). 26,29,30,31,37,
38,40

Hopkins v. Price Waterhouse 825 F.2d 458 (D.C. Cir. 1987), *rev'd in part*, 490 U.S. 228 (1989). 19,26,27,
28,29,31,33,34,35,36,40,41

Lander v. Lujan, WL 294562 (D.D.C. 1991); Civ A. No. 85-3833 JGP . . 24

Katradis v. Dav-El of Washington
846 F.2d 1482 (D.C.Cir. 1988) . . 37

cases

page

Massachusetts BD. of Retirement v. Murgia, 427 U.S. 322-325 (1976) . 23

McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817(1973). 25,26,27,32

Meritor Sav. Bank, FSB v. Vinson 106 S.Ct. 2399 (1986). . . 29,30,31, 37,38,39

N.L.R.B. v. Transportation Management Corp., 103 S.Ct., at 2469(1983).27,45

Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668(7th Cir. 1993).31,38

St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) . 25,39

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089. 67 L.Ed.2d 207 (1981). . 25,26, 27,29

Wilson v. Monarch Paper Co., 939 F.2d 1138 (8th Cir. (1991). 31,38

United States v. Gypsum, 333 U.S. 364, 365, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948) 43

STATUTES AND REGULATIONS:

29 U.S.C. § 633a et seq. 3
29 U.S.C. § 623(d). 45

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANCIS J. DASHNAW,

Petitioner,

v.

U.S. Department of Transportation, an Executive Department of the Federal Government; FREDERICO PEÑA, Secretary of Transportation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

Francis J. Dashnaw, on his own behalf, hereby petitions this Court for a writ of certiorari to the United Stated Court of Appeals for the District of Columbia Circuit. Neither his attorney of record, who does not practice before the Supreme Court, nor any other attorney helped prepare this petition.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears as Appendix A, bearing case

numbers 92-5256 & 92-5274, and is reported at *Dashnaw v. Peña*, 12 F.3d 1112 (D.C. Cir. 1994). The memoranda and order appealed to the Court of Appeals, Appendices B, C, and D, are unreported. The Petition for Rehearing and hearing en banc appears as Appendix E. The orders denying an en banc hearing and rejecting a rehearing appear as Appendix F. Selected parts of Cross-Appellant/Appellee's briefs appear as Appendix G and Appendix H. References to J. A. for Court of Appeals are deleted.

JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the District of Columbia Circuit on January 7, 1994 and March 29, 1994. The jurisdiction of this Court is invoked under Title 28 of the United States Code § 1254(1).

STATUTORY PROVISIONS INVOLVED

These Code Sections deal with the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a et seq. and the rights of a federal employee and agency conduct relating to age discrimination, retaliation, constructive discharge and remedy.

STATEMENT OF THE CASE

The following is a brief chronology of pertinent evidence from the extensive record. The qualifications and performance of the petitioner are not at issue. His performance was always satisfactory or above. See App. B at 16a, 31a. His qualifications and activities were highly regarded and above average. See App. B at 28a-29a, 30a-31a. Some evidence presented at trial bears on the discharge of the plaintiff after trial.

Petitioner accepted a GS-14/1 engineering position with the Maritime Adminis-

tration in September 1967 at a substantial reduction in income from an executive level engineering manager position with Chrysler Corporation with the understanding that he would be promoted to a GS-15 grade, for which he had been qualified, as soon as the new R&D program got underway. See App. B at 27a; App. C at 81a. A memorandum to that effect was filed by the hiring official. See App. B at 27a-28a. After that R&D program got underway, younger employees with much less education and training and experience were promoted past the petitioner as exceptions without competition or by other unfair practices. See App. B at 13a, 23a, 26a, 32a, 35a, 38a-39a; App. C at 77a; App. H at 138a. Friends of the third level supervisor were hired at higher grades and pay steps using rigged selection procedures depriving the petitioner of opportunities. See App. B at 19a 34a 38a,

42a, 48a. Petitioner made numerous attempts to be promoted. App. C at 77a.

Some research projects developed by the petitioner were forcibly transferred from him, with predictable humiliation, to younger much less experienced personnel who were at higher grade and pay. One such person had been placed in the position that had been basically that of the petitioner. See Tr.; App. B at 49a, 50a-51a, 58a. One such project forcibly transferred was a very large project in which petitioner's name as the technical representative was erased from the contract documentation and replaced by the name of the younger man. This was done after the petitioner had done all of the precontract work and at the last stage of contract approval without the prior knowledge of the petitioner. See Tr.; App. B at 58a, 56a; App. C at 67a; App. E at 97a; App. G at 121a; App. H at 133a.

False promises of promotion were made repeatedly to petitioner with requests for him to prepare a proposed program (Tr.; Exh.). Younger personnel did not have to prepare such a program to get promoted past the petitioner. App. B at 28a, 32a.

The harrassing note (Tr.; Exh.) from Mr. Z. Levine is an early example of harassment. See also App. C at 39a.

The petitioner tried to leave the office including his written request to the Office of Personnel to assist him in leaving the organization which was unanswered (Tr.; Exh.; App. G at 123a).

In 1975, a humiliating and upsetting untrue claim was made in front of others by petitioner's third level supervisor who stated that petitioner did not accept a certain individual as a "supervisor" which petitioner was promptly able to prove false (Tr.) with the aid of that "supervisor,"

who was not a supervisor (Tr.). At that time, petitioner made a verbal claim to that third level supervisor that he felt that he was being discriminated against. He was immediately physically and verbally assaulted by that supervisor. Later at trial, that event was described by the petitioner when, after he described how he was being pounded on in his heart area, he reached an emotional limit and could not complete the rest of the description of the assault. See Tr.; App. G at 119a.

Petitioner was then force transferred and layered under a nonsupervisor of lesser age, experience and training with attendant loss of rank and opportunities and predictable humiliation which left him vulnerable to loss of job in the then advertised upcoming desk audit. App. B at 25a-26a; App. E at 95a, 96a; App. G at 111a, 120a. Petitioner filed an administrative com-

plaint of discrimination on that forced transfer in 1975 which also included claims of non-promotion and possible loss of job against that third level supervisor. App. B at 25a-26a. A later filing to the court shows that these actions are surprisingly similar to the "layering technique" described in a Congressional report (Exh.) which recognized that "if they did not resign ... this 'layering technique,' followed by a reduction in force after a respectable waiting period, was the technique used ...". App. E at 96a; App. G at 120a; Exh.. The agency's proffered reason for the forced transfer "to save jobs" was rejected by the District Court. App. B at 66a. Petitioner was forced to remain in that humiliating position until his discharge seven years later.

The agency viewed itself as having an "age problem" and acted to drop the average

age by 20 years in 5 years (by flushing out older personnel) which was considered an achievement by both the agency and Dep't of Commerce. App. B at 24a, 26a, 33a-36a, 98a; App. H at 138a.

Petitioner continued to try to leave that office without success. He filed three more administrative complaints of discrimination in 1975-76 based on his nonselection in four advertised positions outside that office including retaliation claims. App. B at 26a-27a; Tr.; Exh.'s.

In 1977, petitioner filed a complaint in District Court.

Petitioner was exposed to further offensive and humiliating actions and conditions. These included degrading remarks such as Mr. Pitkin's statement to petitioner of his policy of "letting people that he didn't like sit at an empty desk with nothing to do and that the organiza-

tion could absorb it" (Decl.); and, actions such as his dropping a dirty penny into plaintiff's cup of coffee and saying "This is what I think of you." App. G at 119a; Decl.. At least one employee was told not to talk to the petitioner (Tr.).

Petitioner was allocated less travel funds to monitor his contracts (Tr.; Exh.) and forced to discontinue his representation of the agency on technical panels of professional societies (App. E at 98a; App. G at 122a; Tr.).

One of the selecting officials/rater slandered the petitioner by making the false statment under oath that "Based on Mr. Dashnaw's actions to date, applying for every GS-15 job and filing a discrimination complaint when he does not get selected, I would have some doubts about his stability. I would therefore doubt his ability to deal with people in sensitive situations, and

this, too, would be cause for not selecting him." App. G at 120a; Tr..

An alarming threat to be worked over with a baseball bat was made to petitioner before trial. Petitioner reported that incident in writing (Exh.) to the Office of Security; unanswered. App. G at 120a.

The nine day trial commenced on April 21, 1980.

A long time EEO counselor testified that agency supervision made working conditions intolerable for older employees. App. G at 110a-111a; Tr.. Several others also testified to the mistreatment of older personnel. App. G at 123a. While conditions were made very attractive for younger personnel. App. B at 40a-41a; Tr..

Following trial, the agency gave the plaintiff even less funding support, and significantly less than that provided to his co-workers (Tr.; Exh.'s). The plain-

tiff, and only the plaintiff, was not allocated any funding support by the agency for any Fiscal Year 83 research projects (planned late CY 81 to beginning of CY 1982) which left the plaintiff with no future work to do. App. E at 95a; App. G at 112a; App. H at 133a. There was no response to the plaintiff's repeated requests for new assignments. App. E at 95a; App. G at 122a; Decl.. Unlike all other technical personnel, plaintiff was being left to sit at an empty desk with little or nothing to do (Decl.), being denied assignments or reassignment, which, in the mind of the petitioner, is particularly abhorrent and degrading to a professional and is the ultimate in loss of rank. App. G at 121a.

Inappropriate questioning of plaintiff on the status of his case was made on nearly a daily basis. App. E at 98a.

At the end of April 1982, the agency

abolished the plaintiff's position, and only his position, claiming a business necessity. App. G at 108a. The agency offered the petitioner "another position" as required because he was a veteran; however, the "offer" was not a valid offer because it had no identified title, job description, job number, or other identifier. Decl.'s. The plaintiff refused that one and only offer and was not afforded an opportunity to search any register for a position. Plaintiff actively sought other employment within and outside of government. App. G at 108a; Decl's; Exh.'s.

Following trial in 1980, defendant continued to humiliate the plaintiff by keeping plaintiff "layered" under a younger less experienced non-supervisory and, as petitioner submits, the agency showed bad faith in never correcting the complained of forced transfer 7 years earlier despite the

evidence at trial. App. E at95a; App.G at 111. It is reasonably to conclude that there was no likelihood for his advancement or correction of his status (App. H at 139-140) and that that environment was intolerable in a discriminatory way. He was not eligible to retire; hence, he was forced to choose between accepting either involuntary termination or the status quo of sitting at an empty desk -- no other viable option was offered. Plaintiff's stated belief that it would be destructive to him to be isolated in a room without windows with no work to do was reasonable. App. G at 124a; Decl..

The record shows that these career ending circumstances followed many years of discriminatory and/or retaliatory denial of promotion and mistreatment of the petitioner (and other older personnel), despite the agreement of grade change made prior to his hire in 1967, and promises of promotion

thereafter and his numerous and various attempts to be promoted. That, with the other factors that contributed to the intolerable and humiliating conditions, and the knowledge from the trial that the agency treated older personnel adversely (Tr.; App B at 32a-73a) and was a proven discriminator (App. E at 103a; App. G at 114a), and that Mr. Schindler, also a veteran, and his attorney had a three year fight on the abolishment of his position (App. G at 123a; Tr.), and in the absence of a decision by the court, set the stage for plaintiff's termination. Plaintiff was involuntarily terminated from employment on June 29, 1982 before the issuance of any decision by District Court. No RIF plan, or authority for it, was ever produced to show any objective criteria by which to determine which job(s) would be eliminated and for what reason(s). It was later learned

that plaintiff was the only person terminated in 1982. App. E at 95a; App. G at 108a, 112a, 113a. He remained on the job until his discharge while urging the court for a decision; expected daily. He applied for discontinued service retirement being unable to get another position in government. Decl.. The District Court was notified of the change in status of the plaintiff and urged for a decision. App. A at a4. He repeatedly urged the court for a decision before and thereafter (Docket sheet). The plaintiff never gave up any rights to his claims on any of the positions that he was denied.

New personnel were observed in the offices by the plaintiff shortly after his discharge. Decl.; App. G at 116a. Another older professional was the only individual involuntarily terminated in CY 1983 as part of the continuing pattern. App. G at 118a.

District Court filed Memorandum in 1985 in favor of the plaintiff, then vacated it to consider motions and to give the parties a chance to settle. The plaintiff then reminded the court that he had been discharged. District Court filed Memorandum on April 4, 1988 which found for the plaintiff, but omitted the constructive discharge issue. App. B.

The plaintiff filed required motion for relief which included relief for the discharge. Many filings and exhibits ensued on the issues of constructive discharge and tracking of the promotion history.

The agency claimed that the plaintiff was RIF'd because of budget reductions and that several personnel were effected. Decl.'s. The plaintiff showed that the reason proffered for abolishing his position was pretextual and that the plaintiff was actually the only person discharged in

1982 (App. G at 116a-118a; Decl's).

As part of his request for make whole relief, the plaintiff requested the tracking of the promotion/benefit history of one of the four individuals who were discriminatorially selected over the plaintiff. The Vacancy Announcement for that position (Tr.; Exh.) was advertised as a GS-15 as an underfilled GS-16 position and states that the incumbent would be promoted without competition as soon as a GS-16 slot became available. In 1977, the selectee was accordingly promoted as the plaintiff would have been absent the now uncontested discrimination. At least one of the other three selectees was also promoted further. App. G at 126a-129a; Decl.; Exh..

District Court filed a Memorandum Order on September 9, 1989 (App. C) that included a ruling that there was a continuing pattern or practice of discrimination

sufficient to justify an award of back pay going back to 1973 (not 1975 as cited in App. A at a5). App. C at 75a-77a, 85a. The court also ruled that the plaintiff "[h]as presented a strong case for constructive discharge" (App. C at 81a). That ruling was based on the court's comparative analysis of the circumstances in the then precedent circuit cases of *Hopkins v. Price Waterhouse*, 263 U.S. App. D.C. 321, 825 F.2d 458 (1987), reversed on other grounds, 109 S.Ct. 1775 (1989); and *Clark v. Marsh*, 214 U.S.App.D.C. 350, 665 F.2d 1168 (1981), with the instant case. App. C at 78a-84a. In referring to the record, the District Court concluded that:

"Under these circumstances, it is understandable that the plaintiff decided to accept termination since a reasonable person would have concluded that all he could have expected was more of the same, and that a reasonable person would have concluded that those working conditions were intolerable. The Court concludes based upon those facts that the Plaintiff was

constructively discharged from his position.". App. C at 83. Emphasis added

In it's analysis, the District Court apparently did not feel it necessary to consider the plaintiff's claim that "... he was sitting at his desk with nothing to do and that he found this to be repugnant." App. C at 83.

District Court denied the requested tracking of the promotion history of the chosen selectee by ruling that "Whether the plaintiff would have been promoted to a Grade 16 is subject to speculation." Petitioner submits that this ruling is error. App. C at 84a.

The court issued an Order on May 11, 1992 (App. D) granting, in pertinent part, relief for the constructive discharge. The defendant appealed, in pertinent part, claiming insufficiency of evidence for the constructive discharge decision of District

Court. The plaintiff cross-appealed, in pertinent part, for the requested tracking of the promotion history of the selectee for make-whole relief. App. E at 93a-94a, 104a-105a; App. G at 126a-130a; App. H at 142a-146a.

The Court of Appeals ruled, in pertinent part, that: (i) "... a District Court must find not only intentional discrimination, but also 'aggravating factors.'"; and, (ii) "Under the case law of this circuit, the trial court's finding's plainly cannot support a conclusion that Dashnaw was constructively discharged. We also find that the record is insufficient to support a constructive discharge claim."; and, (iii) on the appellee/cross appellant's request for make-whole relief in tracking the promotion history of the chosen selectee, "Nothing in the record persuades us that this finding is clearly

erroneous, and we accordingly uphold it." (App. A at a7).

Petitioner's arguments on the claim of retaliatory conduct were not acknowledged. App. E at 100a-102a; App G at 109a, 124a-125a, 131a; App. H at 132a.

The cryptic notice by plaintiff's counsel to the court in 1982 on plaintiff's change in status was apparently relied on as an evidentiary statement by the Court of Appeals. App. A at a3-a4. That filing erroneously states that the plaintiff resigned. The evidentiary record shows that he was involuntarily separated.

Petitioner requested a rehearing, hearing en banc (App. E) which were denied.

REASONS FOR GRANTING THE PETITION

The questions are raised in view of the exceptional national importance of rising age discrimination in the work place. Specifically, this case presents

place. Specifically, this case presents questions on the standards for rulings on the discharge of older workers predicated on uncontested age discrimination and relief under ADEA.

The Supreme Court recognized age discrimination as a serious problem in *Massachusetts BD. of Retirement v. Murgia*, 427 U.S. 322-325 (1976). The Supreme Court has had little or no opportunity to address the problem of age discrimination with discharge in federal employment.

I

WHETHER DENIAL OF A PART OF THE REQUESTED MAKE-WHOLE RELIEF AS BEING "SPECULATIVE" IS CONSISTENT WITH THE STANDARDS SET BY THE SUPREME COURT

Petitioner submits that the lower courts erred in ruling that "Whether plaintiff would have been promoted to Grade 16 is subject to speculation." in denying part of the requested make-whole relief.

App. C at 84a; App. A at a7. To avoid repetition herein, please see petitioner's argument that he should have been further promoted as presented in App. H at 142a-146a, and App. G at 126a-130a. The enunciations in *Albermarle Paper Company v. Moody* 422 U.S. 405, 418-19 (1975) and of *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. at 762, 765 (1976) makes it clear that petitioner should have been promoted further under the circumstances of the case. The precedent in the circuit also supports this claim of the petitioner. See *Brown v. Marsh*, 713 F.Supp. 20 (D.D.C. 1989), at 24, where it is ordered that Brown's "[c]areer path shall track Scheuddig's." See also *Lander v. Lujan*, WL 294562 (D.D.C. 1991); Civ A. No. 85-3833 JGP on ordered promotion to SES grade. The relief granted should include tracking the promotion/benefit history of the selectee.

II

WHETHER THE COURT OF APPEALS APPLIED AN APPROPRIATE AND CONSISTENT STANDARD AND ADHERED TO THE GUIDANCE GIVEN BY THE SUPREME COURT IN REVERSING THE DISTRICT COURT'S RULING ON CONSTRUCTIVE DISCHARGE

Petitioner submits that his discharge, whether seen as either an actual or constructive discharge, may be established as a violation under ADEA by proving: disparate treatment without consideration of the uncontested finding of age discrimination; or, disparate treatment with consideration of the uncontested finding of age discrimination; or, retaliation against him for filing complaints and prosecuting his case; or, a hostile or intolerable work environment. See *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), 36 L.Ed.2d 668 (1973), and its progeny, *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248,

101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) for disparate treatment as recently exemplified in *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104 (8th Cir. 1994). See *Clark* and *Hopkins* on disparate treatment with consideration of a finding of discrimination. Retaliation is addressed as a separate question below. See *Harris v. Forklift Systems, Inc.* 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), for the standard on hostile environment (if held to apply to ADEA under the circumstances of this case).

In *Gaworski*, a recent ADEA case, the 8th circuit found discriminatory termination by RIF without a predicate finding of age discrimination. There is no mention of "aggravating factors." The guidelines of *McDonnell Douglas* (411 U.S. at 802) and *Burdine* were followed. Petitioner submits that he would have also prevailed on the discharge issue in District Court under the

same reasoning and standards had the District Court articulated the steps in the *McDonnell Douglas & Burdine* guidelines to the petitioner's discharge as it did in the finding of age discrimination. The plaintiff met his burden of proof. The burden then shifts to defendant to show by a preponderance of the evidence that the plaintiff was RIF'd for legitimate nondiscriminatory reasons (see holding in *Price Waterhouse v. Hopkins,* 109 S.Ct. 1775 (1989), at 1795). The plaintiff showed that the reasons proffered for his being RIF'd were pretextual and not worthy of belief.

Petitioner submits that the agency had the ultimate burden of proof by a perponderance of the evidence, on the discharge issue only, after an uncontested finding of age discrimination following the reasoning of *Price Waterhouse, supra,* at 1795, and *N.L.R.B. v. Transportation Management*

Corp., 103 S.Ct., at 2469 (1983). In this light, the issue before the Court of Appeals would have been whether or not the agency met its burden of proof rather than the demand that plaintiff prove "aggravating factors."

After its finding of age discrimination in promotion, petitioner submits District Court reasonably based its finding of a "strong case of constructive discharge" on its knowledge and interpretation of the facts in this case with its comparative analysis on the Court of Appeals' decisions in *Hopkins* and *Clark*. It is reasonable to conclude that the District Court needed go no further after its comparative analysis that the standard of constructive discharge, albeit unclear, as set in *Hopkins* and *Clark* was met and thereby satisfy Rule 52(a). The District Court further based its decision on the

applicable legal and relevant standard of "intolerability of working conditions" that would "cause a reasonable person to quit." Petitioner submits that it was appropriate and reasonable for District Court to rely on those precedent cases of *Hopkins* and *Clark* and delimit its findings and conclusions accordingly.

It is clear in the record that petitioner wanted, and fought for, one of the positions that he deserved and to get out of the situation that he was forced into as exemplified in his first complaint and action since that time rather than be unemployed.

Petitioner further submits that the standard of "intolerability of working conditions" used by District Court is consistent with both *Burdine* and the hostile environment standard enunciated in *Harris* reaffirming *Meritor Sav. Bank, FSB*

v. Vinson, 106 S.Ct. 2399 (1986). The *Meritor* standard, affirmed in *Harris*, is aimed at Title VII violations. It requires an objectively hostile or abusive environment as well as victim's objective perception that the environment is abusive and requires consideration of all the circumstances, not any one factor, and that the severity offends broad rule of workplace equality. Petitioner submits that the facts of the case and perception of the petitioner fit those standards. Petitioner submits that District Court correctly found constructive discharge by considering all the circumstances, frequency of conduct, its severity, physically threatening or humiliating as well known to the court. Such circumstances and events are recited in the above Statement of Case and more fully in the record. Petitioner submits that he should be afforded the same right

to work and to work in an environment free from discriminatory intimidation, ridicule, and insults as those protected under Title VII aside from the legitimate expectations of petitioner to be promoted per agreement. See *Meritor, supra,* at 2405.

The one brief paragraph on the Court of Appeals' analysis on the issue of constructive discharge (App. A at a7) gives no showing that it either: followed the dictates of *Anderson,* 105 S.Ct. 1504; or, followed the guidance and standard provided by the Supreme Court in *Harris* and *Meritor* and *Price Waterhouse;* or, held to the circuit's own precedents of *Hopkins,* and *Clark;* or, precedents in other circuits such as in *Rodgers v. Western-Southern Life Ins. Co.,* 12 F.3d 668 (7th Cir. 1993) or *Wilson v. Monarch Paper Co.,* 939 F.2d 1138 (8th Cir. (1991); or, considered the evidence in the light of the *McDonnell*

Douglas guidelines; or, fairly considered the facts and the law presented by Appellee/Cross-Appellant in Appendices G, H, & E. Further, there is no indication that the Panel reviewed the record in favor of appellee.

The Panels apparent brief review of this case with its voluminous record with 9 days of trial and numerous filings and exhibits and court memoranda strongly suggests that the panel did not adhere to the dictate of *Anderson*, that:

"If the district court's *account of the evidence is plausible in light of the record viewed in its entirety*, the court of appeals may not reverse it ..."

There is nothing in the Appeals Court's decision that suggests that the record was so viewed or that any of the extensive arguments on the facts and the law presented by the appellee were considered.

Petitioner submits that the Panel

failed to credit the standard used by the trier of fact in his comparative analysis with *Hopkins & Clark* and his knowledge and interpretation of the facts in its statement:

> "[I]n this case, the District Court found no aggravating factors at all, but simply relied on its finding that MARAD had discriminatorially failed to promote Dashnaw as support for its conclusion that the agency had made appellee's working conditions 'intolerable'." See App.A at a7.

Chief Judge Penn, who is noted for his sound deliberations, did not give any indication that he relied only on a failure to promote to support his finding of "a strong case of constructive discharge" nor did he use the expression "aggravating factors" at all. However, petitioner submits that it can be fairly drawn that the Court of Appeals did itself rely solely on "failure to promote" in its finding of constructive discharge in its reversal of the District Court's decision in the case

of *Hopkins*, without any mention of the expression "aggravating factors." The only conditions cited by the Court of Appeals in *Hopkins* is that she was denied promotion and not renominated for promotion:

> [P]rice Waterhouse's decision to deny Hopkins partnership status, however, coupled with [its Office of Government Service's] failure to renominate her, would have been viewed by any reasonable senior manager in her position as a career ending action. Accordingly, it amounted to a constructive discharge. App. C at 80a.

and,

> [I]ntolerableness of working conditions is very much a function of the reasonable expectations of the employee, including expectations of promotion or advancement. App. H at 140a.

That denial of promotion was for a much shorter period than the 15 years of denial of promotion in the instant case and the prospects for future promotion were no different. The Supreme Court makes no use of the term "aggravating factors" in *Price Waterhouse* or any other such civil rights

case known to petitioner. The Court of Appeals makes no mention of *Hopkins'* case in its review of the instant case or shows where Judge Penn erred in his comparative analysis of *Hopkins* and *Clark* with respect to the instant case.

In *Clark*, the District Court did not make a finding of "constructive discharge" (see *Clark, Supra* at 1171). The Court of Appeals granted relief for such a finding based on little more than nonpromotion (App. C at 79a) with only passing reference to, and no identification of, any "aggravating factors" per se, stating:

> [P]laintiff does not claim only a single instance of nonpromotion, or even simply a period of nonpromotion. Instead she alleges, and the district court found, a continuous pattern of discriminatory treatment encompassing deprivation of opportunities for promotion, lateral transfer, and increased educational training, existing over a period of years. See *Clark, supra.* at 1174.

In further comparison, petitioner submits

that the intolerability of conditions are much less severe in *Clark,* who voluntarily retired, (App. C at 78a) than those in the instant case. Hence, the District court's finding that plaintiff had a "strong case of constructive discharge" is reasonable.

In *Bishopp v. District of Columbia,* 788 F.2d 781 (D.C. Cir. 1986) cited by the Appeals Court (App. A at a7), the District Court had found for the employer on all counts. The Court of Appeals, in reversing the finding of discrimination and remanding the claims of constructive discharge and retaliation back for reconsideration, mentioned the expression "aggravating factors," at 789-790, citing *Clark,* but failed to identify any such "factors" to support its action. By inferring a definition from *Hopkins* and *Clark,* the instant case is replete with "aggravating factors."

The Court of Appeals cites the case of

Katradis v. Dav-El of Washington, 846 F.2d 1482, 1485 (D.C.Cir. 1988). App. A at a7. as support of for its claim that:

> [a] District Court must find not only intentional discrimination, but also "aggravating factors."

There is no such reference to "aggravating factors" on either of the cited pages (beginning page and ending page) or elsewhere in *Katradis*.

Petitioner submits that the Court of Appeals applied either an incorrect or inappropriate standard in the instant case in ruling that it could not find any "aggravating factors," whatever its meaning, or incorrectly or inconsistently applied it. The Supreme Court in *Harris & Meritor* uses the more descriptive terms "hostile environment" and "abusive environment." The questionable meaning of the yet undefined expression "aggravating factors" does not necessarily yield the same inter-

pretation and weight as the *Meritor* standard as refined in *Harris*. It has not been found where the D.C. Circuit has ever cited *Meritor* since it was decided in 1986 for comparison.

In the constructive discharge case of *Rodgers*, citing *Meritor* at 673, the Seventh Circuit, at 667, adopted "a test that focuses on the impact of the employer's actions on a reasonable person." District Court in the instant case also used a reasonable person standard. In *Rodgers*, there is no use of the term "aggravating factors." Petitioner submits that District Court's decision in the instant case has as much or more merit than that in *Rodgers*.

In *Wilson*, a jury trial ADEA case on age discrimination and retaliation and constructive discharge, there is no mention of "aggravating factors." There are some striking similarities with the instant

case. At 1138, 1145, it was found that:

"[e]mployer was actively seeking to 'bring in new blood' to management and that younger men were in fact given employee's responsibilities as his job was slowly eliminated through process of attrition.";

and, at 1148, that:

"[W]ilson was involuntarily terminated and rendered jobless by a condition directly caused by the discriminatory conduct of Monarch."

Judge Penn had adequate evidence to decide the issue of constructive discharge by the preponderance of evidence standard and the standard of "intolerability of working conditions" consistent with the *Meritor* standard. Petitioner submits that the trier of fact is clearly best able to weigh working conditions, humiliating factors, etc., with his notes and superior knowledge of a case in making a decision on intolerability. The Supreme Court in *Hicks* seems to support that reasoning. The credibility of witnesses is also relevant.

See *Anderson, supra,* at 1511-12. The lack of credibility of the defendant's witnesses is reflected in the trial testimony, exhibits, court's Memorandum and Memorandum Order and subsequent affidavits and exhibits.

In *Harris, supra* at 371, the Supreme Court extended it's guidelines to Title VII cases of race, gender, religion, or national origin to help reduce the conflict between the circuits but with no mention of age discrimination.

Petitioner submits that the Court of Appeals' reversal of District Court's decision in *Hopkins* from a finding of no constructive discharge, and the granting of relief for constructive discharge after the lack of a finding of constructive discharge in *Clark* and then reversing the District Court's finding of constructive discharge in the instant case that relied on those

decisions, is both incongruent and incomprehensible. Even assuming a valid difference of opinion on how the *Hopkins & Clark* decisions were interpreted by the District Court, petitioner submits that the Court of Appeals should have remanded the case back to District Court as done in *Bishopp*, in fairness to petitioner, for more appropriate findings. App. E at 93, 99, 102.

Petitioner submits that the facts in his case show more than a reasonably close nexus between age as a substantial factor and his discharge. The causal relationship between age and discharge of older personnel is more than inferred in the extensive evidence on pattern-or-practice and similar acts extensively covered at trial.

The unrefuted forced transfer and layering of plaintiff would, alone, cause a reasonable professional person to quit as would the denial of any new work or assign-

ments and his having to sit at an empty desk with nothing to do. All the evidence is connected and consistent with the rulings of Judge Penn.

As shown above, The lower courts did not have or consequently use a clear and consistent standard for the determination of "constructive discharge" predicated on a separate finding of age discrimination for other cause. Petitioner submits that there is a need for further guidance of the Supreme Court in this area of law and to expand the body of experience and informed judgment to which the courts and litigants can rely on. There may be appropriate and meaningful differences in criteria for constructive discharge under ADEA as opposed to Title VII. The need for better decision criteria is further illustrated by the fact that each of the Title VII constructive discharge cases cited by District

Court and Court of Appeals were reversed up or down. None of the cases held as precedents by the lower courts in this matter are ADEA cases. Further, the District Court's decision should not have been reversed unless it committed legal error or there was a "definite and firm conviction that a mistake has been committed." *United States v. Gypsum*, 333 U.S. 364, 365, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

III

WHETHER IT WAS ERROR FOR PANEL TO FAIL TO CONSIDER THE ARGUMENTS ON THE RETALIATORY CONDUCT ON CONSTRUCTIVE DISCHARGE CLAIM

Petitioner submits that the Panel erred by failing to consider retaliatory conduct/motive in the discharge of the petitioner as argued by the Cross-Appellant/Appellee. To avoid repetition herein please see arguments at App. G at 109a, 124a-125a, 131a; App. H at 132a; App. E at 100a-102a.

The inference that the respondent wanted the petitioner gone can be fairly drawn based on the record. It seems clear that substantial culpable retaliatory motive and conduct occurred notwithstanding the intertwining of conditions and events that could show both retaliatory conduct and the uncontested age discrimination. The filing of his verbal complaint in 1975 marked the end of his spotless career which led to denial of assignments and ultimately his involuntary termination.

The RIF of the petitioner was contrary to the Veterans Preference Act by not giving petitioner a real alternative. Further, had the plaintiff been promoted as he should have been, as later decided by the court, his job could not have been abolished. The agency must have intended that consequence. Use of the retirement system should not be allowed as a tool to

get rid of older employees such as the petitioner and to deny him the relief that he sought.

A retaliatory motive can be inferred from defendant's awareness of plaintiff's complaints of age discrimination and the agency's pattern of conduct as shown in the record. There is no credible explanation for the agency's conduct other than age discrimination and/or retaliation and the agency offered none. Employer may not discharge employee for opposing practices made unlawful by ADEA.[1] The Supreme Court, in *N.L.R.B. v. Transportation Management Corp, supra*, at 2469, in a case of retaliatory discharge, held that:

"... burden of proof was properly placed on

---

[1] ADEA, 29 U.S.C. § 623(d), makes it unlawful for an employer to discriminate against any of his employees ... because individual, ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

employer to prove by a preponderance of the evidence that employee would have been fired for permissible reasons ...".

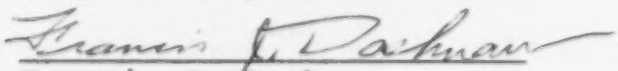
The defendant failed to meet that burden.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the District of Columbia should be granted.

Decisions involving age discrimination deserve special attention because of time and age factors and misuse of retirement plans. It has been 19 years since petitioner filed his first complaint. The Supreme Court could assume a special burden to make the ADEA more workable.

Respectfully submitted,



Francis J. Dashnaw
Petitioner

Current Mailing Address:
P.O. Box 1018
South Dennis MA 02660
(508) 394-6954